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3404 E. Harmony Road
Mail Stop 35
FORT COLLINS, CO 80528

EXAMINER

NILAND, PATRICK DENNIS

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1796

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/775,660
Filing Date: February 09, 2004
Appellant(s): CHEN ET AL.

Julia Church Dierker
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 4/12/10 appealing from the Office action mailed 11/13/09.

(1) Real Party in Interest

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The following is a list of claims that are rejected and pending in the application:

1-25.

(4) Status of Amendments After Final

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

(5) Summary of Claimed Subject Matter

The examiner has no comment on the summary of claimed subject matter contained in the brief.

(6) Grounds of Rejection to be Reviewed on Appeal

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the subheading "WITHDRAWN

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REJECTIONS.” New grounds of rejection (if any) are provided under the subheading “NEW GROUNDS OF REJECTION.”

(7) Claims Appendix

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant’s brief.

(8) Evidence Relied Upon

6102998

IU et al.

08-2000

US Patent Application Publication No. 2004/0035319 YEH et al. 02-2004.

US Patent Application Publication No. 2004/0242726 WAKI et al. 12-2004.

WO 03/097753 WAKI et al. 11-2003

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

A. Claims 1-10 and 13-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over US Pat. Application Publication 2004/0035319 Yeh et al. in view of WO 03/097753 as interpreted by US Pat. Application Publication US 2004/0242726 Waki et al..

Yeh discloses an inkjet ink containing self dispersing pigment in the instantly claimed amount, the instantly claimed amount of 1,2-alkyldiol, and polyurethane. The amount of polyurethane is not disclosed. The polyurethane is not disclosed as being insoluble or soluble in water. The disclosure of polyurethane per se is taken as encompassing both since there are only two options for water solubility. Furthermore, it is noted that the instantly claimed limit for water solubility encompasses very low solubilities in water.

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It would have been obvious to one of ordinary skill in the art at the time of the instantly claimed invention to use the instantly claimed amounts of water soluble polyurethane as the polyurethane of Yeh because the instantly claimed amounts would be required to give the low viscosities and surface tensions required of inkjet inks, Waki shows water soluble polyurethanes in the instantly claimed amounts to be useful as binders in ink jet inks at sections[0056]-[0057], [0058]-[0066], the amount being disclosed in section [0067] of Waki, which includes the polyurethanes of the instant claims 1, 3-5, and 21-24, water soluble polyurethanes clearly require no additional surfactant and thereby eliminate the well known harmful effects of such surfactants, such as decreased adhesion and discoloration, and the properties resulting from the water solubility and amounts of the polyurethanes of Waki would have been expected in the inks of Yeh. See Yeh, the abstract, sections [0002], [0016]-[0030], [0046], [0059], which falls within the scope of the instant claim 8, [0060]-[0061], which falls within the scope of the instant claim 9, [0063] of which “may” indicates that surfactants are not required which falls within the scope of the instant claim 17, [0066], [0068], and [0069], which falls within the scope of the instantly claimed 1,2-alkydiols and the amounts thereof of the instant claims 1, 2, 6-7, and 25, [0071], which discloses polyurethanes generally, [0073], which falls within the scope of the instant claims 13-14,

It would have been obvious to one of ordinary skill in the art at the time of the instantly claimed invention to use the instantly claimed pHs of the instant claims 15-16 to maintain the acid groups of the pigment of Yeh and the polyurethanes of Waki neutralized so as to maintain dispersion stability thereof in aqueous media and to avoid damaging high alkaline conditions simultaneously.

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Yeh does not disclose the solvent of the instant claim 10.

It would have been obvious to one of ordinary skill in the art at the time of the instantly claimed invention to use the instantly claimed solvents of the instant claim 10 in Yeh because Yeh discloses the use of cosolvents generally, Waki teaches the use of such solvents at paragraphs [0076]-[0077] and the benefits thereof would have been expected in the inks of Yeh.

The inkjet printing of the above discussed composition according to the methods of Yeh falls within the scope of the instant claims 18-19. The ink is necessarily in a cartridge of the instant claim 20.

The 131 affidavit filed on 7/17/09 under 37 CFR 1.131 has been considered but is ineffective to overcome the Yeh et al. reference.

The appellant's Affidavit under 37 CFR 1.131 of 7/17/09 has been fully considered. The examiner particularly notes therein: "IV. Attached Exhibit 1 is a copy of pages from my (George Sarkisian) laboratory notebook describing our invention as defined in claim 1 of the above-identified application, dated prior to May 29, 2003. The ink formulations shown in Exhibit 1 are identified by reference numbers 4229, 4230, and 4231. Each of these ink formulations include a self-dispersed pigment (IJX 600-1,6575-65), 1,2-alkyldiol (1,2-hexanediol); and a single polyurethane resin (nbz 3570/60)."

The examiner notes MPEP 715, particularly "where the reference has a prior art date under 35 U.S.C. 102(e) prior to appellant's effective filing date, and shows but does not claim the same patentable invention. See MPEP § 715.05 for a discussion of "same patentable invention." See MPEP § 706.02(a) and § 2136 through § 2136.03 for an explanation of what references

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qualify as prior art under 35 U.S.C. 102(e).” and “III. REFERENCE DATE TO BE OVERCOME The date to be overcome under 37 CFR 1.131 is the effective date of the reference (i.e., the date on which the reference is available as prior art).”

See MPEP 21 2136.03 [R-6] Critical Reference Date, particularly “III. PRIORITY FROM PROVISIONAL APPLICATION UNDER 35 U.S.C. 119(e)

The 35 U.S.C. 102(e) critical reference date of a U.S. patent or U.S. application publications and certain international application publications entitled to the benefit of the filing date of a provisional application under 35 U.S.C. 119(e) is the filing date of the provisional application with certain exceptions if the provisional application(s) properly supports the subject matter relied upon to make the rejection in compliance with 35 U.S.C. 112, first paragraph. See MPEP § 706.02(f)(1), examples 5 to 9. Note that international applications which (1) were filed prior to November 29, 2000, or (2) did not designate the U.S., or (3) were not published in English under PCT Article 21(2) by WIPO, may not be used to reach back (bridge) to an earlier filing date through a priority or benefit claim for prior art purposes under 35 U.S.C. 102(e).” Therefore, Yeh et al. is entitled to the Provisional application filing date of 6/6/02, which the instant 131 affidavit does not swear behind. The prior art date of Yeh et al. is 6/6/02. The appellant does not swear behind this date. The appellants' 131 affidavit is not persuasive for this reason.

See 715.02 [R-6] How Much of the Claimed Invention Must Be Shown, Including the General Rule as to Generic Claims, particularly “Note, however, where the differences between the claimed invention and the disclosure of the reference(s) are so small as to render the claims obvious over the reference(s), an affidavit or declaration under 37 CFR

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1.131 is required to show no more than the reference shows. In *re Stryker*, 435 F.2d 1340, 168 USPQ 372 (CCPA 1971). In other words, where the examiner, in rejecting a claim under 35 U.S.C. 103, has treated a claim limitation as being an obvious feature or modification of the disclosure of the reference(s) relied upon, without citation of a reference which teaches such feature or modification, a 37 CFR 1.131 affidavit or declaration may be sufficient to overcome the rejection even if it does not show such feature or modification.

Further, a 37 CFR 1.131 affidavit is not insufficient merely because it does not show the identical disclosure of the reference(s) or the identical subject matter involved in the activity relied upon. If the affidavit contains facts showing a completion of the invention commensurate with the extent of the invention as claimed is shown in the reference or activity, the affidavit or declaration is sufficient, whether or not it is a showing of the identical disclosure of the reference or the identical subject matter involved in the activity.

See *In re Wakefield*, 422 F.2d 897, 164 USPQ 636 (CCPA 1970)."

See MPEP 715.03 [R-2] Genus-Species, Practice Relative to Cases Where Predictability Is in Question and note MPEP 715.02 " See, however, MPEP § 715.03 for practice relative to cases in unpredictable arts."

The appellant's declaration shows only a single species of polyurethane. The cited prior art reads on the entire genus thereof. It is not seen that all of the polyurethanes covered by the prior art are rendered obvious by the single species of the appellant's 131 affidavit. The appellant's 131 affidavit is therefore not commensurate in scope with the cited prior art and the instant claims. The appellant's 131 affidavit therefore does not meet the implicit requirement of MPEP

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715.03 “The test is whether the facts set out in the affidavit are such as would persuade one skilled in the art that the appellant possessed so much of the invention as is shown in the reference. In re Schaub, 537 F. 509, 190 USPQ 324 (CCPA 1976).”

Chemistry is an unpredictable art. It is not seen that the species of the appellants' 131 affidavit that all of the polyurethanes encompassed by the instant claims and the cited prior art are rendered obvious by the single species of the appellant's 131 affidavit. It is not seen that the appellant's 131 affidavit “contains facts showing a completion of the invention that is commensurate with the extent of the invention as claimed as is shown in the Yeh et al. reference.

See MPEP 715.07(a) Diligence, particularly “Where conception occurs prior to the date of the reference, but reduction to practice is afterward, it is not enough merely to allege that appellant or patent owner had been diligent. Ex parte Hunter, 1889 C.D. 218, 49 O.G. 733 (Comm'r Pat. 1889). Rather, appellant must show evidence of facts establishing diligence.”

The appellant's arguments have been fully considered but are not persuasive in view of the above statements and the teachings of the cited prior art. This rejection is therefore maintained.

B. Claims 11-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over US Pat. Application Publication 2004/0035319 Yeh et al. in view of WO 03/097753 as interpreted by US Pat. Application Publication US 2004/0242726 Waki et al. as applied to claims 1-9 and 13-25 in paragraph 8 above and further in view of Iu et al. (U.S. 6,102,998).

Yeh discloses an inkjet ink containing self dispersing pigment in the instantly claimed amount, the instantly claimed amount of 1,2-alkyldiol, and polyurethane. The amount of polyurethane is not disclosed. The polyurethane is not disclosed as being insoluble or soluble in water. The disclosure of polyurethane per se is taken as encompassing both since there are only two options

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for water solubility. Furthermore, it is noted that the instantly claimed limit for water solubility encompasses very low solubilities in water.

It would have been obvious to one of ordinary skill in the art at the time of the instantly claimed invention to use the instantly claimed amounts of water soluble polyurethane as the polyurethane of Yeh because the instantly claimed amounts would be required to give the low viscosities and surface tensions required of inkjet inks, Waki shows water soluble polyurethanes in the instantly claimed amounts to be useful as binders in ink jet inks at sections[0056]-[0057], [0058]-[0066], the amount being disclosed in section [0067] of Waki, which includes the polyurethanes of the instant claims 1, 3-5, and 21-24, water soluble polyurethanes clearly require no additional surfactant and thereby eliminate the well known harmful effects of such surfactants, such as decreased adhesion and discoloration, and the properties resulting from the water solubility and amounts of the polyurethanes of Waki would have been expected in the inks of Yeh. See Yeh, the abstract, sections [0002], [0016]-[0030], [0046], [0059], which falls within the scope of the instant claim 8, [0060]-[0061], which falls within the scope of the instant claim 9, [0063] of which “may” indicates that surfactants are not required which falls within the scope of the instant claim 17, [0066], [0068], and [0069], which falls within the scope of the instantly claimed 1,2-alkydiols and the amounts thereof of the instant claims 1, 2, 6-7, and 25, [0071], which discloses polyurethanes generally, [0073], which falls within the scope of the instant claims 13-14,

It would have been obvious to one of ordinary skill in the art at the time of the instantly claimed invention to use the instantly claimed pHs of the instant claims 15-16 to maintain the acid groups of the pigment of Yeh and the polyurethanes of Waki neutralized so as to maintain

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dispersion stability thereof in aqueous media and to avoid damaging high alkaline conditions simultaneously.

Yeh does not disclose the solvent of the instant claim 10.

It would have been obvious to one of ordinary skill in the art at the time of the instantly claimed invention to use the instantly claimed solvents of the instant claim 10 in Yeh because Yeh discloses the use of cosolvents generally, Waki teaches the use of such solvents at paragraphs [0076]-[0077] and the benefits thereof would have been expected in the inks of Yeh.

The inkjet printing of the above discussed composition according to the methods of Yeh falls within the scope of the instant claims 18-19. The ink is necessarily in a cartridge of the instant claim 20.

Waki and Yeh do not disclose the solvents of the instant claims 11-12.

It would have been obvious to one of ordinary skill in the art at the time of the instantly claimed invention to use the instantly claimed solvents of the instant claims 10-12 in the above discussed inks of Yeh and Waki because Iu et al., which is drawn to ink jet ink, disclose the use of hydantoin solvents identical to that presently claimed in order to produce ink with enhanced image quality, waterfastness, and dry time (col.4, lines 41-65 and col.9, lines 20-24) and such cosolvents are encompassed by Yeh.

The evidence submitted is insufficient to establish diligence from a date prior to the date of reduction to practice of the Yeh et al. reference to either a constructive reduction to practice or an actual reduction to practice. There is no evidence of diligence in the appellant's 131 affidavit.

The 131 affidavit filed on 7/17/09 under 37 CFR 1.131 has been considered but is ineffective to overcome the Yeh et al. reference.

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The appellant's Affidavit under 37 CFR 1.131 of 7/17/09 has been fully considered. The examiner particularly notes therein: "IV. Attached Exhibit 1 is a copy of pages from my (George Sarkisian) laboratory notebook describing our invention as defined in claim 1 of the above-identified application, dated prior to May 29, 2003. The ink formulations shown in Exhibit 1 are identified by reference numbers 4229, 4230, and 4231. Each of these ink formulations include a self-dispersed pigment (IJX 600-1,6575-65), 1,2-alkyldiol (1,2-hexanediol); and a single polyurethane resin (nbz 3570/60)."

The examiner notes MPEP 715, particularly "where the reference has a prior art date under 35 U.S.C. 102(e) prior to appellant's effective filing date, and shows but does not claim the same patentable invention. See MPEP § 715.05 for a discussion of "same patentable invention." See MPEP § 706.02(a) and § 2136 through § 2136.03 for an explanation of what references qualify as prior art under 35 U.S.C. 102(e)." and "III. REFERENCE DATE TO BE OVERCOME The date to be overcome under 37 CFR 1.131 is the effective date of the reference (i.e., the date on which the reference is available as prior art)."

See MPEP 21 2136.03 [R-6] Critical Reference Date, particularly "III. PRIORITY FROM PROVISIONAL APPLICATION UNDER 35 U.S.C. 119(e)

The 35 U.S.C. 102(e) critical reference date of a U.S. patent or U.S. application publications and certain international application publications entitled to the benefit of the filing date of a provisional application under 35 U.S.C. 119(e) is the filing date of the provisional application with certain exceptions if the provisional application(s) properly supports the subject matter relied upon to make the rejection in compliance with 35

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U.S.C. 112, first paragraph. See MPEP § 706.02(f)(1), examples 5 to 9. Note that international applications which (1) were filed prior to November 29, 2000, or (2) did not designate the U.S., or (3) were not published in English under PCT Article 21(2) by WIPO, may not be used to reach back (bridge) to an earlier filing date through a priority or benefit claim for prior art purposes under 35 U.S.C. 102(e).” Therefore, Yeh et al. is entitled to the Provisional application filing date of 6/6/02, which the instant 131 affidavit does not swear behind. The prior art date of Yeh et al. is 6/6/02. The appellant does not swear behind this date. The appellants' 131 affidavit is not persuasive for this reason.

See 715.02 [R-6] How Much of the Claimed Invention Must Be Shown, Including the General Rule as to Generic Claims, particularly “Note, however, where the differences between the claimed invention and the disclosure of the reference(s) are so small as to render the claims obvious over the reference(s), an affidavit or declaration under 37 CFR 1.131 is required to show no more than the reference shows. In re Stryker, 435 F.2d 1340, 168 USPQ 372 (CCPA 1971). In other words, where the examiner, in rejecting a claim under 35 U.S.C. 103, has treated a claim limitation as being an obvious feature or modification of the disclosure of the reference(s) relied upon, without citation of a reference which teaches such feature or modification, a 37 CFR 1.131 affidavit or declaration may be sufficient to overcome the rejection even if it does not show such feature or modification.

Further, a 37 CFR 1.131 affidavit is not insufficient merely because it does not show the identical disclosure of the reference(s) or the identical subject matter involved in the activity relied upon. If the affidavit contains facts showing a completion of the invention

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commensurate with the extent of the invention as claimed is shown in the reference or activity, the affidavit or declaration is sufficient, whether or not it is a showing of the identical disclosure of the reference or the identical subject matter involved in the activity.

See *In re Wakefield*, 422 F.2d 897, 164 USPQ 636 (CCPA 1970).”

See MPEP 715.03 [R-2] Genus-Species, Practice Relative to Cases Where Predictability Is in Question and note MPEP 715.02 " See, however, MPEP § 715.03 for practice relative to cases in unpredictable arts.”

The appellant’s declaration shows only a single species of polyurethane. The cited prior art reads on the entire genus thereof. It is not seen that all of the polyurethanes covered by the prior art are rendered obvious by the single species of the appellant’s 131 affidavit. The appellant’s 131 affidavit is therefore not commensurate in scope with the cited prior art and the instant claims. The appellant’s 131 affidavit therefore does not meet the implicit requirement of MPEP 715.03 “The test is whether the facts set out in the affidavit are such as would persuade one skilled in the art that the appellant possessed so much of the invention as is shown in the reference. *In re Schaub*, 537 F. 509, 190 USPQ 324 (CCPA 1976).”

Chemistry is an unpredictable art. It is not seen that the species of the appellants' 131 affidavit that all of the polyurethanes encompassed by the instant claims and the cited prior art are rendered obvious by the single species of the appellant’s 131 affidavit. It is not seen that the appellant’s 131 affidavit “contains facts showing a completion of the invention that is commensurate with the extent of the invention as claimed as is shown in the Yeh et al. reference.

See MPEP 715.07(a) Diligence, particularly “Where conception occurs prior to the date of the reference, but reduction to practice is afterward, it is not enough merely to allege that

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appellant or patent owner had been diligent. Ex parte Hunter, 1889 C.D. 218, 49 O.G. 733 (Comm'r Pat. 1889). Rather, appellant must show evidence of facts establishing diligence.”

The appellant’s arguments have been fully considered but are not persuasive in view of the above statements and the teachings of the cited prior art. This rejection is therefore maintained.

(10) Response to Argument

The following arguments apply to paragraph (9)A. and paragraph (9)B. above:

The applicant’s arguments that the instant claims are limited to only one resin and that Yeh recites "binders" and "polyurethanes", plural is not an indication that the prior art requires more than one resin. It is typical that references refer to such genera in the plural sense so as to encompass all of the members thereof. This is not a requirement that more than one species be used in a single composition. The appellant argues "can include" "more than one binder". "Can include" does not require more than one binder, as the appellant's argument clearly acknowledges by their use of "can". Furthermore, Yeh recites only one resin, e.g. polyurethanes. It is noted that no resin is a single molecule, as evidenced by average concepts in polymer chemistry such as average molecular weight, average functionality and average monomer content and distribution. The real polyurethanes of the appellant are therefore more than one type of polyurethane molecule, i.e. “polyurethanes”.

The appellant’s argument that one of ordinary skill in the art would not assume that the polyurethanes of Yeh are water soluble is correct. However, the above rejection is not based on one of ordinary skill in the art assuming that the polyurethanes of Yeh are water soluble. See the above rejection. Yeh does not exclude water soluble polyurethanes. There are only two choices, e.g. those polyurethanes that are water soluble and those that are not water soluble. The lack of

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exclusion of water soluble polyurethanes is taken as including them. Furthermore, Waki gives the rationale to use water soluble polyurethanes in inkjet inks similar to those of Yeh, particularly coupled with the ordinary skilled artisan's understanding that water soluble polyurethanes give stability of the composition, e.g. the water soluble polyurethane will not phase separate from the aqueous phase because it is soluble rather than dispersed, without added surfactants, which are well known to affect film properties, particularly adhesion and discoloration thereof. Waki specifies water soluble polyurethanes at paragraph [0057] thereof. Prior art is not required to have examples and is valid for all that it teaches. Furthermore, it is noted that the water solubility level of the instant claims is very low. Thus, any water soluble polyurethanes of the prior art will have this level. Paragraph [0066] of Waki discloses the acid numbers of the instant claim 5, noting the preferred range particularly. Since these hydrophiles are what control "solubility" in water, the fact that they are the same in Waki and the instant claims is sufficient evidence that Waki encompasses the instantly claimed water soluble polyurethanes. The rationale for using water soluble polyurethanes in the inks of Yeh, as stated above, is clear to one of ordinary skill in the art at the time of the instantly claimed invention.

Applicant's arguments regarding the additional water soluble resin of Waki do not address the above rejection, particularly the disclosure of Yeh, which does not require the second water soluble resin. Since Yeh discloses using one resin, e.g. polyurethane, of unspecified amount and water solubility, Yeh is taken as encompassing the water soluble polyurethanes of Waki and the amounts thereof, which fall within the scope of the instantly claimed amounts of water soluble polyurethane, considering the amounts of pigment of Yeh and the exemplified amounts of pigment of Waki, given that the above cited amounts of water soluble polyurethane

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of Waki are based on pigment amount. Waki, paragraph [0067] gives the rationale for using such amounts, particularly the recited binder effect on film properties such as gloss and its effect on ink stability. These benefits would clearly be desired in the inks of Yeh. Furthermore, Yeh specifies the low viscosities which are conventional in inkjet inks at paragraph [0073].

Therefore, their inks could not contain very much of the polyurethane and the polyurethane must be of relatively low molecular weight, e.g. within the instantly claimed molecular weights, or else the required viscosity would be exceeded, as would be understood by one of ordinary skill in the art considering rudimentary considerations in polymer chemistry, e.g. concepts found in undergraduate chemistry and the beginnings of polymer texts, i.e. the well known concepts, such as "viscosity average molecular weight", inherent viscosity, and intrinsic viscosity, all of which establish the correlation between polymer molecular weight and amount of polymer to viscosity of the solution.

There are no unexpected results seen from the use of water soluble polyurethane in the instantly claimed amounts in the inks of Yeh which are demonstrated in a manner commensurate in scope with the instant claims and the cited prior art.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Patrick D Niland/
Primary Examiner
Art Unit 1796

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Conferees:

/David Wu/
Supervisory Patent Examiner, Art Unit 1796

/Gregory L Mills/
Supervisory Patent Examiner, Art Unit 1700